No. 94-1511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
Petitioners,
v.
FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the district court's order in this "access to the courts" case exceeds the constitutional requirements set forth in *Bounds v. Smith*, 430 U.S. 817 (1977).

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in legal issues that affect state and local governments.

This case presents an issue of continuing importance to *amici*: what must a State do to meet its constitutional obligation to provide prisoners with "access to the courts?" The courts below answered that question by imposing extraordinarily detailed and intrusive obligations on the Arizona Department of Corrections, requiring, among other things, that the Department (1) implement expansive prison law library operating hours; (2) provide fully equipped law libraries at every prison unit with a capacity of 150 or more inmates; (3) provide full-time librarians with law, library science, or paralegal degrees at every prison law library; (4) offer an extensive inmate legal assistant training program; (5) provide a complete set of regional reporters for each law library; and (6) provide trained legal assistants for all inmates. This approach threatens both to impose enormous burdens on *amici*—burdens that will be especially difficult to carry at a time of tight budgets —and to restrict the ability of prison administrators to manage their institutions. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

A. The prisoner right of access to the courts recognized in *Bounds v. Smith*, 430 U.S. 817 (1977), precludes States from imposing obstacles that would effectively frustrate a prisoner seeking redress in court. But *Bounds* manifestly did not hold, as the courts below appear to have believed, that prisoners must be assured *effective presentation* of their claims

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to this Court's Rule 37.3.

in court. *Bounds* itself made no such suggestion. And the point is confirmed by the Court's holding in *Murray v. Giarratano*, 492 U.S. 1 (1989), that, even where a particular group of inmates is unable to make effective use of a law library, the State is under no obligation to provide those prisoners with trained legal assistance.

B. This principle leads to the conclusion that the State satisfies its obligation under *Bounds* when it provides prisoners access to an adequate law library —and that the additional measures mandated by the courts below are insupportable. *Bounds* repeatedly indicated that the State must *either* offer a law library *or* make available to prisoners assistance from persons trained in the law. *Bounds* did not suggest that prison systems must provide special legal services to illiterate or non-English speaking prisoners, even though the *Bounds* Court surely was aware of the difficulties faced by such inmates. And the point is again confirmed by *Murray*, where—in the face of a factual finding that death row inmates were incapable of using lawbooks effectively—the Court held that the State need not respond to the particular handicaps of inmates by providing special legal services.

C. The courts below erred in issuing a detailed mandate governing the operation of prison libraries. Their direction to the State failed to take into account the limited resources of the Arizona prison system, the legitimate safety and penological concerns of prison administrators, and the narrow judicial role in prison administration—all considerations that have been emphasized by this Court. Viewed in the light of this Court's holdings, the extraordinarily intrusive order of the courts below dictating the con-

tents of the prison libraries, the degree of access to the library stacks permitted prisoners, the time and manner of access to the library, and the construction of prison library facilities, cannot stand.

ARGUMENT

THE COURT OF APPEALS RECOGNIZED AN IMPROPERLY EXPANSIVE PRISONER RIGHT OF ACCESS TO COURTS

A. *Bounds* Requires Only The Elimination Of Obstacles That Would Frustrate Access To The Courts

This case involves the prisoner right of access to the courts that was first expressly articulated in *Bounds v. Smith*, 430 U.S. 817 (1977). Determining the scope of that right presents unusual difficulties because it has an extraordinarily hazy provenance; the Court has failed to identify with specificity even the provision of the Constitution on which it rests. *See Murray v. Giarratano*, 492 U.S. 1, 11 & n.6 (1989). But the history and purposes of the right of access suggest both its limits and its proper application.

The decisions on which *Bounds* constructed the right of access precluded States from imposing *obstacles* that would effectively frustrate a prisoner seeking redress in court. *See generally Bounds*, 430 U.S. at 822-824. Thus, the first decision in this line held that "the state and its officers may not *abridge or impair* [a prisoner's] right to apply to a federal court for a writ of habeas corpus" by exercising a veto over the filing of a habeas petition. *Ex Parte Hull*, 312 U.S. 546, 549 (1941) (emphasis added). The Court subsequently held that a State could not "effectively foreclose[] access" to the courts by requiring payment of docket fees (*Burns v. Ohio*, 360 U.S. 252, 257 (1959)) or purchase of a transcript that was essential for appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). By the same token, the Court held that inmates could not arbitrarily be precluded from seeking the assistance of fellow prisoners with regard to the preparation of habeas corpus applications and other legal filings. *Johnson v. Avery*, 393 U.S. 483, 489 (1969); *Wolff v. McDonnell*, 418 U.S. 539, 577-580 (1974).

In *Bounds*, the Court built on these decisions in holding that prisons may be required to provide law libraries or equivalent legal resources to prisoners, explaining that States might have "to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." 430 U.S. at 824. Plainly, however, the Court in *Bounds* meant to do no more than require that States "remove[] the barriers to court access that imprisonment * * * erect[s]." *Hooks v. Wainwright*, 775 F.2d 1433, 1436 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986). As the Court explained in some detail (430 U.S. at 825-827), use of legal materials is essential to meaningful advocacy; yet a prisoner—unlike an otherwise similarly situated person who is not incarcerated [2]—is denied access to those materials by

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[2] Neither *Bounds* nor any other decision of this Court has suggested that there is a right to any level of legal assistance for individuals who are not imprisoned and who wish "to pursue a fundamental constitutional claim in the courts (e.g. a parolee who seeks through federal habeas corpus to challenge his conviction or through a civil rights action to present a constitutional claim against the parole agency)." Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 11.2(f) (2d ed. 1992). *See also DeShaney v. Winnebago Cty. Soc.*

the State. Provision of a law library, like waiver of a filing fee, therefore is necessary "to assure meaningful access to inmates able to present their own cases." *Id.* at 824.

The courts below, however, proceeded from a different conception of the right described in *Bounds*. They seemed to have it in mind, not only that prisoners must be guaranteed access to the courts, but also that prisoners be assured an *effective presentation* of their claims in court. *Bounds*, however, made no such suggestion. And the limited nature of *Bounds* is confirmed by *Murray*. There, in the face of a factual finding that prisoners on death row were "'incapable of effectively using lawbooks to raise their claims'" (492 U.S. at 5 (plurality opinion) (citation omitted)), the Court rejected the contention that the State was obligated to provide such inmates "'trained legal assistance.'" *Ibid.* (citation omitted). Instead, the Court found it sufficient that the prisoners be given "adequate and timely access to a law library." *Id.* at 13.

Indeed, any other approach would embark the courts on a journey down what then-Justice Rehnquist called "a slippery slope" (*Bounds*, 430 U.S. at 837 (Rehnquist, J., dissenting)), which would make the drawing of principled and manageable distinctions impossible. After all, the Court has made clear, both in *Murray* and in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that inmates seeking legal relief generally are not entitled to state-financed counsel. As a consequence, if States are required to do more than place inmates on a par with unincarcerated persons by providing for access to legal materials—while not having to go so far as actually to assure effective representation for inmates by offering counsel—determining whether the State has done enough in any given case will turn on an exercise of the trial judge's purely subjective judgment. *Cf. Missouri v. Jenkins*, 63 U.S.L.W. 4486, 4494 (U.S. June 12, 1995) (rejecting remedy in part because it was not "susceptible to any objective limitation"). We proceed to consider the holding below in light of these considerations.

Servs. Dept., 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

B. A State That Provides An Adequate Prison Law Library Need Not Also Offer Specialized Legal Services

1. The limited scope of the right recognized in *Bounds* necessarily leads to the conclusion that the State satisfies its constitutional obligation when it offers an inmate access to an adequate law library—and that the additional measures mandated by the courts below are insupportable.[3] As the Court put

[3] In this case, the specific elements of the order upheld below that go beyond the core requirement of *Bounds* include: (1) the requirement that the State hire full-time, professionally trained librarians with law, library science, or paralegal degrees for every law library (*see* Pet. App. 66a-67a); (2) the requirement that the State provide trained inmate legal assistants—including bilingual legal assistants—to all inmates, even if the inmates are literate and have physical access to a law library (*id.* at 69a-71a); and (3) the requirement that the State provide a legal assistant training program, including a legal research course approximately 60 hours in length, to be taught by lawyers, law students, or trained paralegals at each law library twice a year, *ad infinitum*. *Id.* at 71a-72a.

it in *Bounds*, "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." 430 U.S. at 828 (emphasis added). Not only did the Court use this disjunctive formulation no fewer than five times in *Bounds* (*id.* at 825, 828-829), it also went on to add that "adequate law libraries are *one constitutionally acceptable method* to assure meaningful access to the courts." *Id.* at 830 (emphasis added).

As this language suggests, the *Bounds* principle does not—as the court below believed (*see* Pet. App. 7a-9a)—mandate special legal services for illiterate and non-English speaking prisoners. The *Bounds* Court surely was aware of the difficulties faced by such prisoners when it declared an adequate law library sufficient to meet the States' obligation of assistance. *See Hooks*, 775 F.2d at 1436; LaFave & Israel, *supra*, at § 11.2(f). Indeed, that very problem was specifically acknowledged in an earlier "access to courts" case. *See Johnson*, 393 U.S. at 484. The Court nevertheless indicated that States are obligated only to mitigate the *effects of incarceration*, not all pre-existing problems of individual prisoners that would affect their capacity to exercise their legal rights. *See* LaFave & Israel, *supra*, at § 11.2(f) (noting that the access right would not necessarily require the state to "offset the limitations of the individual * * * that presumably would restrict his capacity to exercise his right of access even if he were not incarcerated").[4]

[4] *See Hooks*, 775 F.2d at 1436-1437; *Bee v. Utah State Prison*, 823 F.2d 397, 398 (10th Cir. 1987); *see also Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985) ("[*Bounds*] foreclosed the question of the practical utility of a library, concluding that access to a library is access to the courts."); *Williams v. Leeke*, 584 F.2d 1336, 1341 (4th Cir. 1978) (Hall, J., concurring in part and dissenting in part) ("The state's obligation considered in *Bounds* is an institutional one which is fulfilled as to all prisoners—even illiterate prisoners—by making legal research materials generally available to inmates * * *."), *cert. denied*, 442 U.S. 911 (1979).

This conclusion is confirmed by *Murray*. As noted above, in that case the district court made a specific factual finding that the special burdens of death row inmates rendered them " 'incapable of effectively using lawbooks to raise their claims' "; as a consequence, the district court held access to an adequate law library insufficient to fulfill the State's burden under *Bounds*. *See Murray*, 492 U.S. at 5 (plurality opinion) (citation omitted). This Court, however, refused to extend *Bounds* to support that result, holding instead that the State's policy of either allowing death row inmates time in the prison law library or permitting them to have law books in their cells was constitutionally adequate. *Id.* at 5, 12. In so doing, the Court rejected a reading of *Bounds* that would have required state prison authorities to operate by different rules depending upon the facts of each case, stating:

> [t]reating such matters as "factual findings," presumably subject only to review under the "clearly-erroneous" standard, would permit a different constitutional rule to apply in a different State if the district judge hearing that claim reached different conclusions. Our cases involving the right to counsel have never taken this tack; they have been categorical holdings as to

> what the Constitution requires with respect to a particular stage of a criminal proceeding in general.

Id. at 12.

That holding dictates the outcome here. The State in *Murray* was not obligated to respond to the particular handicaps of inmates under a capital sentence by providing additional legal assistance, notwithstanding a factual finding that those handicaps rendered the inmates incapable of using lawbooks and the prison library effectively. There is no reason why the handicaps of illiterate or non-English speaking prisoners should dictate a different result in this case. To the contrary, it would be perverse to hold that prisoners with limitations unrelated to incarceration (such as illiteracy) are entitled to a greater right of access to the courts than are death row inmates whose limitations are a consequence of the special burdens resulting from their sentences.

It may be added that the expansion upon *Bounds* worked by the courts below is not necessary to protect a meaningful right of access to the courts for illiterate or non-English speaking prisoners. Those inmates still have a constitutional right to seek the legal aid of their fellow literate inmates. *See Bounds*, 430 U.S. at 824 & n.10 (noting *Wolff*'s holding that illiterate inmates have a right to assistance from literate inmates even though an adequate law library is present); *Johnson*, 393 U.S. at 490. Even though an adequate law library may not directly benefit illiterate or non-English speaking prisoners, it does help them indirectly by improving the quality of assistance from literate inmates. Additionally, illiterate prisoners may, with assistance from a literate

inmate if necessary, seek the assistance of counsel.[5] This puts the illiterate or non-English speaking prisoner on an equal footing with similarly situated unincarcerated individuals, who also would have to seek legal aid or help from English-literate associates to gain access to the courts.

2. In addition, requiring the State to expend scarce legal resources by providing legal assistance beyond an adequate law library will not necessarily inure to the benefit of prisoners. As this Court has often noted, the resources that States may devote to legal services (and to prison systems generally) are limited. *See, e.g., Murray*, 492 U.S. at 11 (plurality opinion); *id.* at 13 (O'Connor, J., concurring). The expense of instituting the programs required by the lower courts in this case would represent a considerable strain on those resources, and might well require a reduction in the expenditures dedicated to providing prisoners legal assistance at trial and during the direct appeal of their convictions—the stages of the process that are crucial in a criminal proceeding.

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[5] The Court has held that the right of "access to courts" necessarily includes a right to seek legal assistance.

> [I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation of other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. 396, 419 (1974). This right to seek legal assistance has been used to strike down regulations and practices that prohibit or unreasonably interfere with the solicitation of legal assistance by mail. *See Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1081 (1994); *Foster v. Basham*, 932 F.2d 732 (8th Cir. 1991); *Washington v. James*, 782 F.2d 1134 (2d Cir. 1986); *Minnesota Civil Liberties Union v. Schoen*, 448 F. Supp. 960 (D. Minn. 1977).

The Court has recognized the danger of ordering accommodations of asserted constitutional rights without taking these sorts of trade-offs into account. "In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources * * *." *Turner v. Safley*, 482 U.S. 78, 90 (1987).

A shift of scarce resources from the trial and direct appeal stages of a criminal proceeding to assistance in filing post-conviction collateral attacks would hardly redound to the advantage of prisoners. The trial provides the criminal defendant his principal opportunity to avoid incarceration and is of utmost importance in the criminal justice system. *See Ross v. Moffit*, 417 U.S. 600, 611 (1974). Of secondary but considerable moment is the direct appeal of a conviction, which "is the primary avenue for review of a conviction or sentence * * *." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1993). The right to counsel for an initial appeal from the judgment or sentence of the trial court reflects the importance of this stage of the criminal proceeding. *See Douglas v. California*, 372 U.S. 353 (1963). In contrast, the role of habeas corpus proceedings is secondary and limited. *See Barefoot*, 463 U.S. at 887; *Murray*, 492 U.S. at 10 (plurality opinion). Accordingly, this Court concluded in *Finley* that there was no federal constitutional right to counsel for post-conviction collateral proceedings:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay* v. *Noia*, 372 U.S. 391, 423-424 (1963). * * * States have no obligation to provide this avenue of relief, cf. *United States* v. *MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.

Id. at 556-557; *see also Murray*, 492 U.S. at 10 (plurality opinion).

Yet the decision below would require States to use scarce resources in providing legal aid to assist prisoners pursuing post-conviction relief. This would preclude the States from making the sensible policy decision to concentrate their resources at the trial and direct appeal stages of criminal proceedings where "[c]apable lawyering * * * would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack." *Murray*, 492 U.S. at 11 (plurality opinion).[6] While the pro-

[6] In addition to the secondary nature of habeas corpus actions, it is useful to note that habeas petitions most often are unsuccessful. "Habeas relief * * * typically has been granted in less than 4% of all petitions filed and an even smaller percentage of petitioners gain release from custody." LaFave & Israel, *supra*, § 28.2; *see also* David McCord, *Visions of Habeas*, 1994 B.Y.U. L. Rev. 735, 768 (discussing problem of large volume of frivolous habeas actions). Prisoner civil rights actions also are rarely successful. *See Procunier v. Martinez*, 416 U.S. at 405 n.9 (noting problem of frivolous prisoner claims); Douglas A. Blaze, *Presumed Frivolous: Application of Straight Pleading Requirements in Civil Rights Litigation*, 31 Wm. & Mary L. Rev. 935, 935-938 (1990) (discussing problem of frivolous prisoner civil rights claims); *Report of the Federal Courts Study Committee* 48-51 (1990) (proposing new procedure to deal with prisoner civil rights cases, which represented 11 percent of all civil filings in 1989); Federal Judicial Center, *Recom-*

vision of legal assistance to prisoners pursuing post-conviction relief or civil actions might be a good idea in the best of all possible worlds, that does not mean that it should be constitutionally mandated. *See Ross*, 417 U.S. at 618. The difficult policy questions concerning the allocation of limited legal resources should be left to the state legislative and executive branches, which are far better equipped to weigh the advantages and disadvantages of various policies than are the courts. *See Turner*, 482 U.S. at 84; *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); *Murray*, 492 U.S. at 11 (plurality opinion); *id.* at 13 (O'Connor, J., concurring).

C. The Lower Courts' Detailed Mandate Regarding The Contents Of And Access To Prison Libraries Is Insupportable

Allowing prisoners access to a law library thus is sufficient to satisfy the requirements of *Bounds*, provided that the library is "adequate" (430 U.S. at 828) and that the degree of access is "meaningful." *Id.* at 823, 825. To require an *adequate* law library, however, is not to require a perfect or superior one. *See Procunier v. Martinez*, 416 U.S. at 420 (prison not required to adopt every proposal that facilitates prisoner access to the courts); *Lindquist v. Idaho Bd. of Corrections*, 776 F.2d 851, 856 (9th Cir. 1985). By the same token, *meaningful* access does not require

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mended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 9-11 (1980); *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 587 (1972). While this is not to gainsay the importance of the right of access to the courts, it does suggest that increasing the level of state resources devoted to such claims—a step that necessarily will be taken at the expense of other state expenditures—is not a sensible policy.

that prisoners be given unlimited use of library resources. *See Campbell v. Miller*, 787 F.2d 217, 226 (7th Cir.), *cert. denied*, 479 U.S. 1019 (1986); *Harrell v. Keohane*, 621 F.2d 1059 (10th Cir. 1980) (per curiam). Instead, it is enough that the resources made available to prisoners offer them a reasonable opportunity to "prepare petitions for judicial relief." *Murray*, 492 U.S. at 11 (plurality opinion).

At the same time, implementation of this principle requires that courts take into account competing considerations: the limited resources of state prison systems (*see Murray*, 492 U.S. at 11 (plurality opinion); *Turner*, 482 U.S. at 90), the safety and penological concerns of prison administrators (*see Washington v. Harper*, 494 U.S. 210, 223 (1990); *Hewitt v. Helms*, 459 U.S. 460, 473 (1983)), and a scrupulous attention to this Court's explanation of the narrow judicial role in prison administration:

> [C]ourts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. * * * The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. 520, 562 (1979); *see also Block v. Rutherford*, 468 U.S. 576, 588 (1984).

It is well understood that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Bell*, 441 U.S. at 545-546 (citing *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977); *Wolff*, 418 U.S. at 555; *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Indeed, in *Turner* the Court made clear that prison administrators must be free to run their institutions without interference from the courts so long as their policies are rationally related to the safety and economic concerns of the prison (482 U.S. at 89) and do not unduly foreclose "other avenues" for the exercise of prisoner rights. *Id.* at 90. This is no less true of the right of access to the courts. Viewed in light of this principle, the order upheld by the court below reveals a consistent misapplication of the "meaningful access" requirement.

1. Contents of the Law Library. Arizona should not be required, as ordered by the courts below, to provide the Pacific Reporter in its prisons' law libraries to meet the constitutional requirement that those libraries be "adequate." To be sure, an adequate prison law library should contain the basic resources necessary to conduct legal research. But it does not follow that every resource that could be useful in a legal research project must be on the shelves of every prison law library. "[P]rison administrators are not required to adopt every proposal that may be thought to facilitate prisoner access to the courts." *Procunier v. Martinez*, 416 U.S. at 420.

Here, a requirement that the Pacific Reporter be provided in Arizona's prison libraries cannot be justified on the grounds that it is a basic resource that

is necessary to conduct legal research.[7] Indeed, another panel of the Ninth Circuit recognized the lesser importance of regional reporters in rejecting an argument that they had to be included in Idaho prison libraries that already provided the Idaho state reporter: "the Prison need not provide its inmates with a library that results in the best possible access to the courts. Rather, the Prison must provide its inmates with a library that meets *minimum constitutional standards*." *Lindquist*, 776 F.2d at 856 (emphasis added). Notably, the plan that was found constitutional in *Bounds* did not include the regional reporter in its law library inventory. 430 U.S. at 819-820 n.4.

2. Access to Library Stacks. The order upheld by the Ninth Circuit requires that all prisoners be allowed direct access to the library stacks, unless prison officials can first document that such access will pose an actual security risk. Pet. App. 67a-68a. The *Bounds* "meaningful access" standard cannot justify this requirement. The inconvenience prisoners may experience from denial of direct access to the library stacks is a minimal infringement on their

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[7] As a result of an earlier district court order, *Wilkinson v. McDougall*, CIV 81-1397 (D. Ariz. Jan. 5, 1984), all 33 of Arizona's state prison law libraries include: the United States Code Annotated; Supreme Court Reporter; Federal Reporter Second; Federal Supplement; Shepards U.S. Citations; Shepards Federal Citations; Local Rules for the Federal District Court; Modern Federal Practice Digest; Federal Practice Digest (Second); Arizona Code Annotated; Arizona Reports; Shepards Arizona Citations; Arizona Appeals Reports; Arizona Law-of-Evidence (Udall); ADOC Policy Manual; 108 Institutional Management Procedures; Federal Practice and Procedure (Wright, Miller, & Cooper); Corpus Juris Secundum; and Arizona Digest.

right of "meaningful" access and plainly is justified by competing safety and administrative concerns.

A restriction on direct prisoner access to the stacks is necessary to serve prison security. *See Harper*, 494 U.S. at 223; *Helms*, 459 U.S. at 473 (safety is a "fundamental responsibility" of prison administration). As the Court has recognized, hardback books are an especially effective vehicle for smuggling contraband. *Bell*, 441 U.S. at 549. It seems not only reasonable but also prudent to deny prisoners a common ground to stash and exchange forbidden material. Books also are an excellent place for inmates to conceal hidden messages to one another. Again, the Court has recognized the State's legitimate security interest in monitoring and controlling inmate communications. *Turner*, 482 U.S. at 91-92. Additionally, prisons must carefully regulate the use of books to prevent vandalism and theft. In light of these obvious and legitimate security and administrative justifications, it is reasonable to restrict direct inmate access to library stacks.

These restrictions are acceptable, of course, because "other avenues" remain available for prisoners to gain access to legal materials. A prison may, for example, use a "call" system by which a prisoner with access to a list of the library's holdings requests that a librarian retrieve particular books from the stacks for him. Under this approach, when the prisoner is finished with the source he turns it in and requests others. Other than the minimal inconvenience of waiting for the librarian to retrieve the source, it is difficult to see how this system would be any less useful than direct access to the library collection. Furthermore, while prohibiting prisoners from browsing through the *stacks* of the prison law

library, this system would still allow prisoners to browse through legal *materials* to follow leads from one source to another. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1110 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987).

For prisoners who are greater security risks, more restrictive practices would be permissible. One method, for example, is a "paging" system whereby prisoners who are not allowed to visit the law library request legal materials or photocopies of those materials that are delivered to their cells.[8] While this might result in delays between request and receipt of a book, such inconvenience, standing alone, hardly amounts to a denial of access to the courts. *Cf. Bounds*, 430 U.S. at 819 (under approved plan inmates would have to wait between three and four weeks to do one day of legal research). This Court has upheld safety practices that constitute far more extensive intrusions on the rights of inmates than the inconvenience of having to wait for particular legal sources. *See, e.g., Harper*, 494 U.S. at 227; *Bell*, 441 U.S. at 558-560.

The requirement that prison officials show a documented security risk before denying a prisoner direct

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[8] Of course, this would assume that the prisoners have some reference materials or other legal assistance (such as inmate paralegals) to help them to determine which materials they should request. Similar systems have been upheld in *Campbell v. Miller*, 787 F.2d 217, 227-228 (7th Cir. 1986); *Cosby v. Purkett*, 782 F. Supp. 1324 (E.D. Mo. 1992); and *Turman v. Romer* 729 F. Supp. 1276 (D. Colo. 1990). *But see Toussaint*, 801 F.2d at 1108-1110; *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (paging system requiring exact citations is inadequate without references for deriving citations); *Kaiser v. Sacramento*, 780 F. Supp. 1309, 1316 (E.D. Cal. 1991).

access to the library stacks (Pet. App. 68a) also is unjustified. "In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents." *Helms*, 459 U.S. at 474. Requiring documentation of a security risk invites a potential challenge every time the prison administration denies a prisoner direct law library access. If administrators must carefully document every risk to protect themselves against legal challenge, they will face a situation where "complying with * * * marginally helpful procedural requirements" would interfere with the efficient and safe management of the institution. *Id.* at 474 n.7. *See Turner*, 482 U.S. at 89.

3. Time, Place, and Manner of Access. The decision below also improperly infringes on the ability of prison administrators to regulate the time, place, and manner in which inmates gain access to and use the prison law library.[9] "A detention facility is a unique place fraught with serious security dangers" (*Bell*, 441 U.S. at 559), which necessarily requires that "prison officials have broad administrative and discretionary authority over the institutions they man-

[9] Among other things, the district court: (1) set, within limits, the operating hours and days for the law libraries, without regard to actual use; (2) dictated where the prisoners may sit in the libraries; (3) set the precise procedure for the prisons' response to library access requests; (4) set procedures for removing prisoners who create disturbances from the law library; (5) prohibited the reasonable restraint of prisoners in the law library; and (6) controlled the noise level in the library. Pet. App. 65a-68a.

age." *Helms*, 459 U.S. at 467. *See Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("The federal courts do not sit to supervise state prisons * * *."). While limits on precise hours of library operation, the implementation of library security measures, and the like may create inconvenience for particular inmates, it is difficult to see these as anything more than *de minimis* restrictions that do not warrant court supervision. *Cf. Meachum*, 427 U.S. at 225.[10]

The related requirement that prisoners be provided with at least ten hours of access to the law library each week also is impermissibly intrusive. We agree that the time allotted for a prisoner to use the library cannot be so low as to deny "meaningful access." No court looking at the issue, however, has suggested that the *minimum* threshold for meeting the "meaningful access" standard is anywhere near ten hours of access to the prison law library a week. *See Cruz v. Hauck*, 627 F.2d 710, 720 (5th Cir. 1980) (expressing reservations about adequacy of two to three hours a week of access); *Williams v. Leeke*, 584 F.2d 1336, 1340 (4th Cir. 1978) (three forty-five minute intervals a week inadequate); *Nadea v. Helgemoe*, 561 F.2d 411, 418 (1st Cir. 1977) (one hour per week inadequate); *Zatko v. Rowland*, 835 F. Supp.

[10] This is not to say that courts should be foreclosed from ordering a prison system to provide prisoners with "meaningful access" to a law library. When the time provided for prisoner use of the library is "meaningful," however, the courts have no business involving themselves in the minute details of the time of day such access is scheduled, the seating arrangements of prisoners using the library, and the procedures used to process inmate requests for library time. These administrative matters involve precisely the types of day-to-day decisions that should be left to local authorities. *See Bell*, 441 U.S. at 563.

1174, 1178 (N.D. Cal. 1993) (holding a plan providing access of two hours a week, with access of four hours a week for inmates with impending court deadlines, reasonable as a matter of law). In fact, the approach taken by the courts below requires far more prisoner time in the law library than the plan approved in *Bounds* itself. *See* 430 U.S. at 819 (providing for one full work day at a law library every three to four weeks). Beyond the minimum requirements of *Bounds*—and absent a showing that prisoners are unable to make effective and meaningful use of the library in the time allotted—it should be up to the prison administrators, not the courts, to weigh the costs and benefits that would attend a shift of prison resources from other penological concerns to providing extra library hours.

4. The Requirement of Additional Prison Libraries. The order upheld by the court of appeals requires, with some exceptions, that Arizona provide fully equipped law libraries for facilities with a population or capacity of 150 or more. Pet. App. 61a. *Bounds* cannot support this mandate. So long as the State is able to provide prisoners with "meaningful access" to the courts, it should be free to adopt methods other than the expensive construction of new library facilities. The State could, for example, adopt a plan by which prisoners without a law library in their facility are bused to other facilities to do legal research. That is precisely the type of plan found adequate in *Bounds*. 430 U.S. at 819. Alternatively, the State could, in lieu of a full law library, provide these prisoners with some form of trained legal assistance or a limited law library supplemented with legal materials borrowed from elsewhere. *See Campbell*

v. Miller, 787 F.2d at 228-229 (approving a similar plan for high-security prisoners not allowed access to the prison law library). If a court finds that prisoners in facilities without law libraries are not receiving "meaningful access" to the courts, it should allow the State to exercise this wide discretion in creating an access plan, rather than foreclosing innovative solutions that could take into account both the prisoner's need for "meaningful access" and the limited resources of the state prison system. *Cf. Bounds*, 430 U.S. at 819.

D. The Decisions Below Exceeded The Proper Judicial Role

As the discussion above suggests, the courts below involved themselves in the management of the Arizona prison system at a level of detail and with a degree of intrusiveness that is quite extraordinary. But they did so entirely without justification. While the district court noted imperfections in Arizona's program (*see* Pet. App. 19a-41a), the courts below expressly declined to ask the inmates to demonstrate that they were *in fact* denied meaningful access to the courts. *See id.* at 5a. Yet this Court repeatedly has admonished the federal judiciary to respect the limits of the injunctive remedy and to fashion relief that is proportional to any constitutional violation.[11]

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[11] *See generally Missouri v. Jenkins*, 63 U.S.L.W. 4486, 4491 (U.S. June 12, 1995) (nature of remedy is to be determined by "nature and scope of the constitutional violation") (citing *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977)); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of relief is dictated by the extent of the violation established."); *Bell*, 441 U.S. at 562 (injunctive power should be invoked to remedy only bona fide constitutional violations,

Although the court of appeals dutifully quoted this principle (*id.* at 13a), it made no effort to implement it in practice.

Just last term, in *Missouri v. Jenkins*, 63 U.S.L.W. 4486 (U.S. June 12, 1995), the Court reaffirmed the limits of the federal judiciary's power to order injunctive relief. Recognizing that "local autonomy of school districts is a vital national tradition" (*id.* at 4494), the Court refused to endorse an approach that would have allowed the district court to take over the management of local schools to increase their "desegregative attractiveness" (*ibid.*) and facilitate the creation of a school system "with facilities and opportunities not available anywhere else in the country." *Id.* at 4488. Instead, the injunctive power of the district court was limited to remedying the specific constitutional violation at issue.

Like school administration, management of the local prison system is of "acute interest to the States." *Meachum*, 427 U.S. at 229. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of the govern-

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not to impose judicial policy preferences on the States); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977); *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 213 (1973) (system-wide remedy only appropriate if system-wide violation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary."); Paul S. Mishkin, *Federal Courts as State Reformers*, 35 Wash. & Lee L. Rev. 949 (1978).

ment." *Turner*, 482 U.S. at 84. Thus, when state prison systems are involved the federal courts should be especially careful in respecting their limited role. *See Procunier v. Martinez*, 416 U.S. at 405; *see also Jenkins*, 63 U.S.L.W. at 4501-4502 (Thomas, J., concurring). *Cf. Bounds*, 430 U.S. at 832-833 (praising district court for respecting limits on its role by allowing the State to fashion its own remedy despite the court's expressed preference for alternative approaches). But the order in question in this case embodies the antithesis of that limited judicial role. It involves a serious intrusion into day-to-day management of the Arizona prison system, is overreaching at almost every juncture, and represents an attempt to create an ideal prisoner legal aid system. However desirable this might be as a matter of policy, such a paternalistic "approach should play no part in traditional constitutional adjudication." *Murray*, 492 U.S. at 11 (plurality opinion).

While the court below acknowledged the intrusiveness of its remedy, it suggested that "'a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy . . . [that] violation.'" Pet. App. 13a (citation omitted). But whatever its validity in other circumstances, that principle has no application here.[12] Even if extra-constitutional relief

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[12] Ironically, the decision that the Ninth Circuit cites for this principle went on to state:

> However, our goal is to cure only constitutional violations. The commission of a federal judge is not a 'general assignment to go about doing good.' Accordingly, injunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved

were justified in some instances, it would not be necessary to remedy any violation in this case. Unlike an unconstitutionally segregated school system, where the social effects of the wrong vastly complicate the remedy (*see Swann*, 402 U.S. at 6), termination of a denial of access to the courts provides a complete remedy for the constitutional injury. Thus, in this case, there is no rationale for allowing injunctive relief that requires more than the Constitution dictates. Accordingly, this Court should find the injunction upheld by the court below to be impermissibly overbroad.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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August 14, 1995

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constitutional violations, and must not intrude unnecessarily on state functions.

Toussaint, 801 F.2d at 1087 (citations omitted).